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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re B.F., a Minor.	D057835
R.F. et al., Petitioners and Respondents, v. D.S., Objector and Appellant.	(Super. Ct. No. A56558)

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

D.S. appeals a judgment terminating his parental rights to his son, B.F., under Family Code[1] sections 7662 and 7664. We affirm.

1 Further statutory references are to the Family Code unless otherwise specified.

INTRODUCTION

California's statutory scheme creates classes of parents, including mothers, presumed fathers and biological fathers. (*Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 825 (*Kelsey S.*).) Mothers and presumed fathers, unless shown to be unfit to parent, have a statutory right to withhold consent to their child's adoption. (*Ibid*.) The consent of a biological father (who is not also a presumed father) is not required for adoption; the adoption may proceed if the court determines adoption is in the child's best interests. (*Adoption of Michael H*. (1995) 10 Cal.4th 1043, 1052 (*Michael H*.).)

If not a statutory presumed father under section 7611, a biological father may attain presumed father status if he promptly demonstrates as full a commitment to his parental responsibilities as the mother allows, and the circumstances permit, after he learns the mother is pregnant with his child. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) If the court determines the father has promptly demonstrated a full commitment to his parental responsibilities, the court may not terminate his parental rights absent a showing of his parental unfitness. (*Ibid*.; *Michael H.*, *supra*, 10 Cal.4th at pp. 1051-1052.)

D.S. contends B.F.'s mother, in consultation with a skilled adoption attorney and the prospective adoptive parents, thwarted his efforts to become B.F.'s presumed father under section 7611. He asserts that under principles of equity and public policy the prospective adoptive parents and the mother should not be permitted to deny him status as B.F.'s presumed father under *Kelsey S.* D.S. also contends the evidence is insufficient to support the finding that he was not B.F.'s presumed father under *Kelsey S.* D.S. asks

this court to remand the matter to the trial court for a new hearing at which he would be permitted to retain his parental rights unless the prospective adoptive parents prove his unfitness as a parent.

We conclude the mother, her attorney and the prospective adoptive parents did not engage in wrongful conduct to deny D.S.'s ability to establish his status as a statutorily presumed father under section 7611 or thwart D.S.'s ability to demonstrate as full a commitment to his parental responsibilities as circumstances allowed and establish his status as a presumed father under *Kelsey S.* (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) There is substantial evidence to support the juvenile court's findings that D.S. was not a presumed father under *Kelsey S.* and that it was in B.F.'s best interests to allow the adoption to proceed. Accordingly, we affirm the judgment terminating D.S.'s parental rights to his biological child B.F.

FACTUAL AND PROCEDURAL BACKGROUND

D.S. and J.G. are the unmarried biological parents of B.F., born in October 2009. D.S. and J.G., then each 18 years old, met in San Diego in December 2008. They were each 18 years old. D.S. was on active duty in the United States Marine Corps (USMC). In January 2009 D.S. left the USMC without permission and traveled with J.G. to his family's home in West Virginia. About a month later, J.G. returned to San Diego and ended her relationship with D.S. The USMC returned D.S. to San Diego on March 3, 2009, halved his pay for two months and restricted him to base for six months.

In mid-April 2009 J.G. learned she was three months pregnant. She decided to place the baby for adoption and retained an attorney. In late May 2009, on the advice of her attorney, J.G. telephoned D.S. to tell him she was pregnant and intended to place the baby for adoption. D.S. asked her to keep the baby. A week later, J.G. informed D.S. she had chosen an adoptive family. D.S. said he wanted custody if J.G. did not keep the baby.

J.G. worked at a pizza parlor until she was more than eight months pregnant. Her father paid for J.G.'s health insurance. The adoptive parents paid the other pregnancy expenses. D.S. did not provide any financial assistance.

D.S. telephoned J.G. on the baby's due date. J.G. told D.S. the baby had been born several days earlier by emergency Cesarean section and was still at the hospital. J.G. said D.S. could not visit the baby for several days and did not give D.S. the name of the hospital. When D.S. telephoned J.G. two days later to see the baby, she said he was in the care of his prospective adoptive parents, C.F. and R.F.

D.S. was given a less than honorable discharge from the Marine Corp. He left San Diego for West Virginia the day after he learned B.F. was in the prospective adoptive parents' care.

On October 15, 2009, D.S. was served with a notice of alleged paternity. On November 13, he filed a petition to establish a parental relationship with B.F. (§ 7630.) The prospective adoptive parents then filed a petition to terminate D.S.'s parental rights,

alleging J.G. had consented to the adoption and B.F. did not have a presumed father. (§ 7662, subd. (a).) The petitions were consolidated for hearing in the juvenile court.

In March 2010 a trial court ordered the prospective adoptive parents to make B.F. available for two visits with D.S. within the week. The parties scheduled visits for Sunday and Wednesday mornings. D.S. visited B.F. on Sunday, March 28 for one hour. He brought toys, diapers and bottles to the visit, and left all but one of the toys with B.F. D.S. left San Diego before the scheduled Wednesday visit with B.F. D.S. said he could not remain in San Diego to visit B.F. because he was losing too much money by not working in San Diego. At that time, D.S. was working in his father's construction company in West Virginia, and his income was approximately $1200 to $1600 a month.

The contested hearing on D.S.'s petition to establish a presumed paternal relationship and the prospective adoptive parents' petition to terminate parental rights was held on May 25 and 26, 2010. D.S. testified that when J.G. telephoned him in late May 2009 to inform him of her pregnancy, she said she did so only because she was required to by law. He offered to help pay for some of the doctor bills and asked her to return to West Virginia with him. D.S. could not obtain assistance from the USMC because he and J.G. were not married. D.S. did not give J.G. any money.

D.S. told his family, friends, members of his USMC squad and his commanding officers that he was going to be a father. In July 2009 D.S. tried to secure the assistance of legal services on base but they did not handle custody cases. D.S. contacted private

attorneys in San Diego but could not afford their services. In October he hired an attorney through the Modest Means Program.

D.S. acknowledged he had used the drug Ecstasy. He had a pending criminal charge in West Virginia for breaking and entering, which would be dismissed in 11 months if he complied with probation conditions.

J.G. testified she knew D.S. for four to six weeks before she went to West Virginia with him. She and D.S. discussed marrying but nothing was finalized. She was not comfortable in West Virginia. D.S. left her alone during the day while he worked and when he returned home he played video games until 2:00 or 3:00 a.m. She was not concerned about D.S.'s ability to be a good parent; however, D.S. had financial issues. The prospective adoptive parents were financially secure. J.G. knew accepting money from D.S. would contribute to his case. She would have accepted his money if he was willing to help but she did not need his help.

Whenever D.S. telephoned or texted J.G., he asked about her well-being and the baby's health. D.S. wanted to accompany J.G. to her doctor visits. She refused because they were not in a relationship. J.G. did not tell D.S. where the baby would be born; it would have made her uncomfortable had he come to the hospital.

J.G. said she was honest with D.S. about the adoption. She did not hide anything and provided him with information on her lawyer's advice. Her lawyer told her not to give the adoptive parent's names, her doctor's name and other information to D.S. The

prospective adoptive parents knew before B.F. was born that they did not have D.S.'s consent to the adoption.

Dr. Ray Murphy, Ph.D., conducted a bonding study of B.F. and the members of the prospective adoptive family. Dr. Murphy said the prospective adoptive parents had taken on the role as B.F.'s primary care providers. B.F. had a primary attachment to C.F. while R.F. played a supporting role. Dr. Murphy believed B.F.'s separation from the prospective adoptive family could result in short-term and/or long-term effects such as a grief reaction, reactive attachment disorder, personality and anxiety disorders, and relational disorders.

Dr. Yanon Volcani, Ph.D., testified that a child's removal from a caregiver at age seven and a half months was not destined to cause significant difficulties for the child if there was a proper transition to the new caregiver.

The juvenile court found that D.S. was not a presumed father under *Kelsey S.* and that it was in B.F.'s best interests to allow the adoption to proceed. The court terminated D.S.'s parental rights. (§ 7664, subd. (b).)

DISCUSSION

D.S. contends he did not have a fair opportunity to establish his status as a *Kelsey S.* presumed father because of the wrongful conduct of J.G., her attorneys and the prospective adoptive parents. Citing *Michael H., supra*, 10 Cal.4th at page 1055, in which the California Supreme Court noted the importance of the father's disclosure to the child's mother of his intent to object or consent to the adoption, D.S. argues that when a

mother decides to place her child for adoption, knowing the child's father objects, as a matter of public policy, she must notify him that she has an attorney and explain what he must do to preserve his parental rights. D.S. contends that, otherwise, the mother, counseled by her attorney, can thwart the father's efforts to attain status as his child's presumed father.

I

STATUTORY PRESUMED FATHER

D.S. contends J.G. was counseled by her attorney to minimize or withhold information to impede his opportunity to become a statutory presumed father under section 7611 and gain custody of B.F. He argues J.G. did not allow him to accompany her to doctor visits, withheld information to prevent him from being present at B.F.'s birth, and waited until after the prospective adoptive parents had custody of B.F. to tell D.S. to contact an attorney. D.S. alleges the prospective adoptive parents were complicit because they knew before B.F.'s birth that D.S. objected to the adoption.

To become a statutory presumed father, a biological father must fall within one of several categories enumerated in section 7611. A biological father who has neither legally married nor attempted to legally marry the child's mother cannot become a presumed father unless he receives the child into his home and openly holds out the child as his natural child. (*Kelsey S.*, *supra*, 1 Cal.4th at pp. 826-827 [father must have actual receipt of the child, constructive receipt is not permitted under the statute].) Alternatively, both the biological father and the mother must execute a voluntary

declaration of paternity. (*Francisco G. v. Superior Court* (2001) 91 Cal.App.4th 586, 595; §§ 7571, 7572, 7611; see generally *In re J.O.* (2009) 178 Cal.App.4th 139, 147-148.) "Once executed, a voluntary declaration of paternity 'establish[es] the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction.' (§ 7573.)" (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1019.)

D.S. asserts the doctrine of equitable estoppel applied because J.G. withheld information from him that would have allowed him to attain *Kelsey S.* status. Generally, equitable estoppel is a rule of fundamental fairness that precludes a party from benefiting from conduct designed to prevent determination of the truth and a resolution based on that determination. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 853 (conc. & dis. opn. of Mosk, J.).) "Whenever a party has, by his [or her] own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he [or she] is not, in any litigation arising out of such statement or conduct, permitted to contradict it." (Evid. Code, § 623.) Estoppel deprives a party of a defense because of the party's own objectionable conduct. (*In re J.L.*, *supra*, 159 Cal.App.4th at p. 1024.)

We decline to apply the doctrine of estoppel here. J.G. did not conceal her pregnancy or her whereabouts from D.S. He had the necessary information to promptly file a paternity action after J.G. told him she was pregnant with his child, which he did not do.

J.G.'s refusal to disclose the name of the hospital where B.F. was born to D.S. did not prevent D.S. and J.G. from filing a voluntary paternity declaration. A voluntary paternity declaration must include the mother's signature and certain statements by the mother. (§ 7574, subd. (b)(1) & (5).) (*In re Mary G.* (2007) 151 Cal.App.4th 184, 200.) The record contains no suggestion J.G. would have cooperated with D.S. in executing such a declaration. D.S. does not cite, and we cannot find, any California case holding that a mother who otherwise acknowledges the father's paternity cannot withhold her consent to a voluntary paternity declaration. D.S.'s inability to be present at the hospital after B.F.'s birth did not foreclose the parents from executing a voluntary paternity declaration. A declaration of paternity may be made by the parents at any time after the child's birth. (§ 7571, subd. (d); see *Kevin Q. v. Lauren W.* (2009) 175 Cal.App.4th 1119, 1131.)

To the extent J.G. was counseled not to reveal pertinent information to D.S., we conclude that J.G.'s reliance on legal counsel to further her decision that adoption was in her child's best interests, and the prospective adoptive parents' involvement in the process, did not constitute objectionable conduct designed to deprive D.S. of the opportunity to establish presumed father status under section 7611.

II

KELSEY S. PRESUMED FATHER STATUS

"If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal

constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849, fn. omitted.)

In determining whether the biological father of a child has demonstrated as full a commitment to his parental responsibilities as the mother allows and circumstances permit, a court considers all factors relevant to that determination, including the father's conduct before and after the child's birth, his public acknowledgement of paternity, the payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) Once the father knows of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother allows and his circumstances permit. The father must be willing to assume full custody of the child and not merely be trying to prevent the child's adoption. (*Ibid.*)

The biological father has the burden to establish the factual predicate for *Kelsey S.* presumed father status. (*Adoption of O.M.* (2008) 169 Cal.App.4th 672, 679.) In reviewing the juvenile court's determination whether D.S. met this burden, we apply the substantial evidence test. (*Adoption of Arthur M.* (2007) 149 Cal.App.4th 704, 717.) Under substantial evidence review, the appellate court does not reweigh the evidence.

The judgment will be upheld if it is supported by substantial evidence, even though substantial evidence to the contrary also exists and the trial court might have reached another conclusion had it believed other evidence. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 631.)

Under *Kelsey S.*, the court considers the limitations imposed on the father by the circumstances, including the mother's conduct. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 839.) J.G. refused D.S.'s requests to accompany her to doctor visits and to be present at the hospital because they were not in a relationship and his presence would make her uncomfortable. D.S.'s inability to attend J.G.'s prenatal visits and to be present at the hospital during B.F.'s birth did not thwart his ability to establish his status as a *Kelsey S.* father. There is nothing in the record to show the court improperly considered D.S.'s absence from prenatal visits and B.F.'s birth in determining D.S. did not make as full a commitment to his parental responsibilities as he could have made under the circumstances. (*Id.* at p. 837.)

We are not persuaded by D.S.'s argument that public policy considerations place a duty on the child's mother to inform the unwed father of his parental rights and responsibilities. *Michael H.* states only that it is important for the father to promptly notify the mother of his plans to consent or object to the adoption. (*Michael H.*, *supra*, 10 Cal.4th at p. 1055.) Public policy requires the mother to promptly inform the father of the pregnancy and her decision to place the baby for adoption, not to inform him of his

parental rights and responsibilities. Here J.G. did not withhold information about her pregnancy from D.S., and she did not impede his ability to obtain legal counsel.

The juvenile court's finding D.S. did not demonstrate as full a commitment to his parental responsibilities as allowed is supported by substantial evidence. The record shows D.S. had an income of approximately $8400 in 2009 from his employment as a Marine, and made approximately $1200 to $1600 per month after he returned to West Virginia. Although he was not financially secure, D.S. could have helped J.G. with some expenses during her pregnancy, made some contribution to medical costs and made some provision, however minimal, for B.F.'s care and development after his birth. Instead he did not contribute at all. J.G. said she would have accepted his help. She worked at a pizza parlor until she was more than eight months pregnant. J.G.'s father paid her medical insurance premiums. The prospective adoptive parents paid other expenses relating to B.F.'s birth and assumed all financial responsibility for his care. The record supports the finding D.S. did not pay pregnancy and birth expenses commensurate with his ability to contribute, and allowed the prospective adoptive parents to fully support B.F. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

The record also supports the finding D.S. did not make a full emotional commitment to B.F. (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849.) On several occasions during her pregnancy, D.S. told J.G. he would prefer she keep custody of B.F. D.S. left San Diego within a week of B.F.'s birth. Significantly, D.S. did not attend a second visit with

B.F., choosing instead to return to West Virginia instead of remaining in San Diego for three more days.

D.S. did not promptly file an action to establish paternity.[2] D.S. left San Diego the day after he learned B.F. was in the care of the prospective adoptive parents instead of remaining in San Diego to seek custody. He did not fully exercise his visitation rights. When asked about his ability to stay in San Diego, D.S. testified it would not be difficult for him to find a job in San Diego, permitting the reasonable inference that he could have stayed in San Diego had he placed a priority on establishing paternity and seeking custody of B.F. D.S.'s circumstances did not prevent him from promptly seeking a judgment of paternity. (*Kelsey S., supra*, 1 Cal.4th at p. 849.)

We conclude there is substantial evidence to support the juvenile court's finding that D.S. did not demonstrate as full a commitment to his parental responsibilities as allowed under the circumstances. J.G.'s decisions not to allow him to attend her prenatal visits and inform him when she went into labor were reasonable exercises of J.G.'s personal autonomy, and did not otherwise prevent D.S. from demonstrating a commitment to his parental responsibilities. The court did not err when it concluded D.S.

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2 Although D.S. was restricted to base because of his absences from the USMC without leave and could not go to a courthouse, the materials necessary to file a paternity action were available to him. The California courts provide an on-line self-help center for filing parentage cases, including necessary forms and instructions, and directions for finding no cost or low-cost assistance. (www.courts.ca.gov/1203.htm#Forms_to_Bring_an_Action_to_Establish_Parentage (as of Feb. 28, 2011); see FL-200, Petition to Establish Parental Relationship, www.courts.ca.gov/xbcr/cc/fl200.pdf (as of Feb. 28, 2011); see also www.courts.ca.gov/1021.htm (as of Feb. 28, 2011).)

was not a presumed father under *Kelsey S.* (*Kelsey S.*, *supra*, 1 Cal.4th at p. 849 [an unwed father must promptly come forward and demonstrate a full emotional and financial commitment to his parental responsibilities].)

II

BEST INTERESTS OF THE CHILD

D.S. contends the evidence is insufficient to support the court's finding that it was in B.F.'s best interests to allow the adoption to proceed. Where, as here, the child's biological father is not the presumed father of the child, the court determines if it is in the best interests of the child that the father retain his parental rights or the adoption be allowed to proceed. In making that determination, the court may consider all relevant evidence, including the efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of a change of placement on the child. (§ 7664, subd. (b).)

If the court finds that it is in the best interests of the child that the biological father be allowed to retain his parental rights, the father's consent is necessary for an adoption. If the court finds it is in the child's best interests that an adoption be allowed to proceed, the biological father's consent is not required for an adoption. This finding terminates all parental rights and responsibilities with respect to the child. (§ 7664, subd. (b).)

The record supports the court's finding that it was in B.F.'s best interests to allow the adoption to proceed. (§ 7664, subd. (b).) D.S. did not promptly initiate legal action. He did not stay in San Diego to seek custody or exercise his full visitation rights,

allowing the reasonable inference that he did not intend to take B.F. into his home. The juvenile court found D.S. did not understand the impact of having a child and the concomitant responsibilities in his life. J.G.'s father and the prospective adoptive father said D.S. appeared to be immature. D.S.'s three absences without leave from the USMC, lengthy periods of playing video games, past drug use and status on criminal probation indicated he was not ready to assume custody of B.F. Further, B.F. was almost eight months old. He had developed a primary attachment to the prospective adoptive mother and was integrated into the prospective adoptive parents' family. B.F. had a sibling relationship with the family's son. Dr. Murphy believed removal from that home would be traumatic for B.F. and might lead to the development of an attachment or personality disorder.

There is substantial evidence to support the finding that it was in B.F.'s best interests to allow the adoption to proceed. This finding terminates all parental rights and responsibilities with respect to B.F. (§ 7664, subd. (b).)

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

HUFFMAN, Acting P.J.

O'ROURKE, J.